No. 16498

In the United States Court of Appeals for the Ninth Circuit

PACIFIC NATURAL GAS CO., A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

Upon Review of Order of Federal Power Commission

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STATEMENT OF JURISDICTION

This is a proceeding to review an order of the Federal Power Commission issued on February 25, 1959 (R. 1372–1374). Petitioner's application for reconsideration, filed on March 18, 1959 (R. 1375–87), which may be treated as application for rehearing, is deemed to have been denied on April 17, 1959, since the Commission had not acted upon it at that time.[1] Section 19(a) of the Natural Gas Act, 15 U.S.C. 717r(a) *infra,* p. 33.[1] The petition for review was filed on June 12, 1959. Jurisdiction of this Court rests upon Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r (b) *infra,* p. 33.

[1] The Commission issued an order denying the motion for reconsideration on July 23, 1959 (R. 1409–1412), prior to the certification of the record to this Court.

STATEMENT OF THE CASE

Pacific Northwest Pipeline Corporation, which is an interstate pipeline company and subject to regulation by the Federal Power Commission as a "natural-gas company" within the meaning of the Natural Gas Act, transports and sells natural gas in interstate commerce for resale to the petitioner Pacific Natural Gas Company under a rate tariff on file with the Federal Power Commission and several service agreements which incorporate by reference the price provisions of the tariff as well as its general terms and conditions.

In August 1957, Pacific Northwest filed with the Commission revised rate schedules increasing the prices provided by its tariff which governed its sales to petitioner. The primary question presented here is whether or not the Commission had "jurisdiction" to accept for filing revised rate schedules relating to sales for resale for industrial use only and to appraise the reasonableness of the increased rates under Section 4, *infra,* p. 29, of the Natural Gas Act.

A brief summary of the Commission's gas rate filing procedure provides a necessary introduction.

1. The Commission's rate filing procedures

When the Natural Gas Act was enacted in 1938, the Commission permitted the natural-gas companies subject to its jurisdiction to file their existing sales contracts as rate schedules so that the contract rates became the effective legal rates. These contracts had been individually negotiated with each purchaser, with the result that the contracts, and the rates defined therein, varied greatly in amount as well as form.

Shortly after the Act's passage, the Commission initiated a program of system-wide tariffs to provide uniform rates for all of a system's equivalent sales and to eliminate discrimination among its customers. To that end, the Commission, in August 1940, circulated among the pipeline companies for comment "Tentative Instructions for Preparing and Filing F.P.C. Rate Schedules" under which the contractual rate schedules would be converted to prescribed tariff forms. The advent of World War II made it impossible to go forward with this undertaking; however, a substantial number of pipeline companies cooperated with the Commission by voluntarily converting their rate forms from contracts to tariffs.[2]

Thereafter, in April 1948, the Commission, noting that the experience under the voluntary conversions demonstrated "the feasibility and desirability of such a change and that benefits and advantages may be expected to result to the public and natural gas companies" (13 Fed. Reg. 2046), again proposed amendment of its rate regulations to establish the tariff system. 13 Fed. Reg. 2045–2050. Upon receiving suggestions and comments from interested persons, the Commission revised the proposed regulations and again invited comments. 13 Fed. Reg. 5214. After the receipt of further suggestions, the Commission made additional revisions in the proposed regulations

[2] Prior to this conversion, the companies had on file with the Commission separate rate schedules consisting of almost 7,000 pages. The substituted tariffs comprised only 388 pages. See 13 Fed. Reg. 6371.

and, in October 1948, issued the regulations as Order No. 144. 13 Fed. Reg. 6371 *et seq.*[3]

Order No. 144, which has been in effect since that time and which (with a few minor amendments not here relevant) is still operative (18 C.F.R. 154.1 *et seq.*),[4] requires the conversion of all rate contracts into tariff-and-service-agreement form, as well as the restatement of all rates in cents or in dollars and cents per unit.[5]

In a tariff-and-service-agreement method of rate making, unlike the earlier contracts, the buyer and seller do not agree in advance on a specific rate for a definite period of time through individual contracts tailored to a particular transaction. Rather, the seller files rate schedules of general applicability, stating the price at which it will sell gas to all its customers within a given zone or class. In addition, it enters into service agreements with its customers which provide

[3] For further summaries of the history of Order No. 144, see 13 Fed. Reg. 6371–2; *United Gas Pipe Line Company*, 16 FPC 10, 12–13.

[4] Order No. 144 now applies principally to pipeline companies, special provision having been made for independent producers by Commission regulations concerning the rates of the latter. 18 C.F.R. 154.91 *et seq.*

[5] To meet special situations, however, the Commission reserved the right to permit the filing of contracts as rate schedules. See Section 154.52 of the order. In addition, under Section 154.85, a contract already on file as an effective rate schedule might be continued in effect as an executed service agreement to the extent that its provisions "are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff * * *." The only exception permitted to the requirement of restatement was where price provisions could not be restated without effecting a change in rates or charges. See Section 154.82.

for the amount of gas to be sold and the duration of the sale. These agreements do not contain a price term, but merely refer to the filed rate effective at the particular time or as it may be superseded.

Order No. 144 was generally accepted by all parts of the industry.[6] As of December 1957, there were 1,100 service agreements[7] filed with the Commission, compared to 141 other contracts of various types filed under Sections 154.52 and 154.85 of the Order (*supra,* p. 4).[8]

2. The pertinent agreement

The rate at which Pacific Northwest sells gas to petitioner for resale for industrial use only is governed by its Rate Schedule I–1 (R. 16), which is contained in Pacific Northwest's FPC Gas Tariff, Original Volume No. 1, originally filed in 1956. Pacific Northwest also filed as part of its tariff, as required by the Commission's regulations (18 C.F.R. 154.40), the form of service agreement which it employs in making sales subject to Rate Schedule I–1 (R. 39–41).

The service agreements between Pacific Northwest

[6] Review of Order No. 144 was sought only by two customer companies. See *United Gas Pipe Line Co.* v. *F.P.C.*, 181 F. 2d 796 (CADC), certiorari denied, 340 U.S. 827; *United Gas Pipe Line Co.* v. *F.P.C.*, DDC Civil Action No. 4680–50. The district court proceeding was dismissed as part of the settlement approved by the Commission in *United Gas Pipe Line Co.*, 13 FPC —, Op. No. 277, issued November 2, 1954.

[7] The 1,100 service agreements include 80 pre-existing contracts, the price terms of which have been restated pursuant to Section 154.85 of the Commission's regulations, *supra*, p. 4, fn 5.

[8] The 141 other contracts include 18 special sales contracts of the type involved in *Mobile*, *infra*, p. 7, the balance consisting of special agreements for gas transportation, exchange and storage, and operating arrangements.

and petitioner with respect to sales for industrial resale only, which were in effect on August 6, 1957, the time of the rate filing here at issue (R. 340–347),[9] provided in part that (R. 342, 345):

> ARTICLE III—APPLICABLE RATE SCHEDULE
>
> Buyer agrees to pay Seller for all natural gas service rendered under the terms of this agreement in accordance with Seller's Rate Schedule I–1 as filed with the Federal Power Commission and as such rate schedule may be amended or superseded from time to time. This agreement shall be subject to the provisions of such rate schedule and the General Terms and Conditions applicable thereto on file with the Federal Power Commission and effective from time to time, which by this reference are incorporated herein and made a part thereof.

The other service agreements between Pacific Northwest and petitioner, as well as those with the other jurisdictional customers of Pacific Northwest, contain the same provision except for a reference to the appropriate Rate Schedule in each instance (R. 1410).

Paragraph 10 of the General Terms and Conditions (R. 34), incorporated into the service agreements by reference, provides as follows:

> Seller's rates, charges, classifications and services as set forth in this Tariff are subject to

[9] The service agreement of May 3, 1957, for industrial interruptible gas only to which petitioner refers (Br. p. 5) is not an effective service agreement since it has not been "filed" by Pacific Northwest. See 18 C.F.R. 154.1, 154.22. But as the Commission noted (R. 1410), the effective service agreements contained identical provisions with respect to the applicable rate schedule.

regulation by the Federal Power Commission under the Natural Gas Act. Seller shall have the right to file from time to time with the Federal Power Commission under Section 4 of the Natural Gas Act such new rate schedules and changes in its existing effective Tariff as Seller may find necessary from time to time to assure Seller just and reasonable rates and charges as well as a rate of return sufficient to service the Seller's debt, attract capital, insure expansion and provide adequate natural gas service to all Seller's customers. Without in any way limiting the generality of the foregoing, Seller shall have the right to file new rate schedules fairly and appropriately reflecting changes in the rates and charges paid by Seller for natural gas. Buyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission.

3. The proceedings before the Commission

On August 6, 1957, Pacific Northwest filed with the Commission revised Rate Schedules whereby it sought to increase all of its rates, including those governing its sales to petitioner. Following its usual practice, the Commission by a letter dated August 7, 1957, requested petitioner's comments on the revised schedules. Petitioner responded to this request urging that the revised schedules be suspended (R. 751). This response did not dispute the Commission's jurisdiction over the rate schedules under Section 4 of the Natural Gas Act, 15 U.S.C. 717c, as construed in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332, since they did not challenge the

filings under *Mobile*. The Commission, on September 4, 1957, partly in response to this request, ordered a hearing to be held on the lawfulness of the proposed rate changes and suspended all of the revised schedules, except those relating to sales for resale for industrial use only (R. 817).[10]

Thereafter, on January 21, 1958, petitioner, relying solely on the decision of the Court of Appeals for the District of Columbia Circuit in *Memphis Light, Gas and Water Division* v. *F.P.C.*, 250 F. 2d 402 (decided November 21, 1957), reversed *sub nom. United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103, asked the Commission to reject for filing Pacific Northwest's revised tariff sheets applicable to sales to it (R. 1062–1065). On April 28, 1958, upon proper motion by Pacific Northwest, the Commission ordered that the suspended rates become effective as of February 5, 1958, subject to Pacific Northwest's giving security to assure refund of the amount of the increased rate found not justified. In this order, the Commission stated it was not at that time passing upon the various motions, including petitioner's, to reject the revised rate schedules (R. 1219, 1220).[11] Following the Supreme Court's Decem-

[10] Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), *infra*, p. 30, provides in part:

* * * That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only * * *.

[11] In addition to petitioner's, motions to reject Pacific Northwest's revised tariff sheets were also filed by Washington Public Service Commission, Public Utility Commission of Oregon, Public Service Commission of Utah, Mountain Fuel Supply Company, Public Service Company of Colorado, Washington

ber 1958 decision in *Memphis*, reversing the lower court and affirming the Commission's action, the Commission on February 25, 1959, denied the various motions to reject the revised schedules, finding that in the service agreements with its customers Pacific Northwest had reserved the right to make unilateral rate changes in accordance with the provisions of Section 4 of the Natural Gas Act (R. 1372). Petitioner's application for reconsideration of this order was denied (R. 1409).[12]

SUMMARY OF ARGUMENT

In the *Memphis* case, the Supreme Court held that a pipeline company may use the filed rate procedure of Section 4(d), *infra,* p. 30, of the Act to effect changes with respect to all its rates unless it has contracted away its right to change its rates unilaterally. The holding of this case is, we submit, dispositive here.

In Point I we show that the service agreement in this case is even more explicit in giving the seller the right to file rate changes under Section 4 than were the service agreements reviewed in *Memphis*. We also show that the purchaser's right to protest rate filings by Pacific Northwest is no greater than that of the purchasers of gas from the seller in the *Memphis* case.

Natural Gas Company, Coos Bay Pulp Corp., et al., and Kaiser Aluminum & Chemical Corp. (R. 1372–1373). Like petitioner's, these motions were filed prior to the Supreme Court's decision in *Memphis*, *supra.*

[12] There were no applications for rehearing or other motions for reconsideration of the order of February 25, 1959, denying the various motions to reject for filing Pacific Northwest's revised rate schedules.

In any event, petitioner's reservation of a "right to protest" is specifically directed at rate filings under Section 4(d) and hence subject to the limited powers of the Commission with respect to rates for resale for industrial use only under that section. Moreover, we show that petitioner's present construction of its service agreements with Pacific Northwest to give the same provisions different meanings depending on whether suspendible or non-suspendible rates are involved is inconsistent with petitioner's actions in this proceeding. Finally, we demonstrate that apart from the Natural Gas Act the pricing provision of the service agreement is enforceable and that even if the service agreement were unenforceable because of the pricing provision, the rate changes filed by Pacific Northwest were properly accepted since *ex parte* filings are sanctioned by Section 4(d) in the absence of a contract.

In Point II we show that the Natural Gas Act is not unconstitutional in permitting a seller unilaterally to file rate increases with respect to sales for resale for industrial use only. Petitioner's first contention that the statutory scheme denies it due process is based on the assumption that the Act deprives it of a right to recover unjustified charges from the seller. We show that, in the absence of the Act, the rate a seller of natural gas could charge was limited only by competitive conditions. Thus, any right of petitioner to pay rates that are just and reasonable stems from the Act. We show that, in these circumstances, petitioner cannot complain of a lack of due process because Congress chose not to permit the Commission

to make retroactive determinations with respect to the reasonableness of non-suspendible rates or to sanction recovery of reparations even though the rates might be found unjust and unreasonable prospectively. Petitioner's recourse is, we submit, to the Congress and not to the courts. Moreover, we show that petitioner was not, by statute, precluded from purchasing industrial resale gas from Pacific Northwest under a suspendible rate schedule but chose to risk the increase in rates since the non-suspendible rates were cheaper and because Pacific Northwest's rates increases, if any, would be passed on to its customers by petitioner.

ARGUMENT

Introduction

The Commission believes that the decision in the *Memphis* case *supra,* p. 8, is fully controlling here. Before showing that the distinctions petitioner seeks to draw are illusory, a brief statement of the *Memphis* case is necessary. In the *Memphis* case, the Supreme Court held that under the Natural Gas Act a pipeline company is not precluded from changing its rates by filing new rate schedules pursuant to Section 4(d) of the Act, unless it has contracted away the right to change its rates unilaterally. It rejected the lower court's determination (250 F. 2d 402) that the filing procedures prescribed by Section 4 (d) and (e) *infra,* p. 30, could be employed by a seller of natural gas only in those instances where the parties to the service agreement had by mutual consent agreed to a rate change of a specific amount.

The Court went on to hold that the Commission was fully justified in finding that under the service agreements involved in *Memphis* the seller had reserved the power unilaterally to make rate changes, subject to the procedures of Section 4 of the Act. The *Memphis* pricing provision provided (358 U.S. at 105):

> All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule (the appropriate rate schedule designation is inserted here) *or any effective superseding rate schedules* on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof. [Emphasis added by the Court.]

The Commission had construed this provision as in effect constituting an undertaking by the purchaser to pay the seller's filed rates. In affirming this construction the Court said (358 U.S. at 114–115):

> It seems sufficient to say that the record shows that these agreements are typical of the "tariff-and-service" arrangements contemplated by Commission Order No. 144, CFR § 154.1 *et seq.*; that until this case no one connected with the industry seems to have thought that agreements of this sort precluded natural-gas companies from changing their rates in accordance with and subject to § 4 (d) and (e) procedures; and that the respondents' present contrary contentions had their sole genesis in a mistaken view of our decision in the *Mobile*

> case. Beyond this, we find nothing in these agreements, as interpreted by the Federal Power Commission, which is hostile to any of the provisions or purposes of the Natural Gas Act.

Accordingly, the Court affirmed the Commission's refusal to reject for filing the new rate schedules filed by United Gas Pipe Line Company in September 1955 generally increasing its prices for gas, including that furnished under rate schedules for sales of gas for resale for industrial use only. As in this case, the Commission, acting under Section 4(e) of the Act, ordered a hearing as to the lawfulness of the proposed new rates, and, except as to those relating to sales for resale for industrial use only, suspended their effectiveness for the maximum five-month period permitted by the Act.

I. Pacific Northwest's service agreement with its purchasers authorized it to file changed rates under Section 4(d) of the Natural Gas Act

An examination of the relevant service agreement between Pacific Northwest and petitioner, which was in effect when the rate change with respect to sales of interruptible industrial gas was filed on August 6, 1957, leaves no doubt that Pacific Northwest had, under the terms of the agreement, reserved its right to file changed rates pursuant to Section 4 of the Natural Gas Act. For under Article III of that service agreement petitioner agreed to pay Pacific Northwest "in accordance with Seller's Rate Schedule I–1 as filed with the Federal Power Commission and as such rate schedule may be amended or superseded from time to time". *Supra*, p. 6. And paragraph 10

of the General Terms and Conditions, *supra,* pp. 6–7, which is incorporated by reference into the service agreement, states that the "Seller shall have the right to file from time to time with the Federal Power Commission under Section 4 of the Natural Gas Act such new rate schedules and changes in its existing effective tariff as Seller may find necessary" to meet certain conditions.

The sufficiency of this language to reserve to Pacific Northwest the right to file changes with the Commission is emphasized by the fact that the contractual language in *Memphis, supra,* p. 12, found sufficient to reserve to the seller the right to make unilateral rate filings was much less explicit than the language here. Indeed, it was limited to a provision no more specific than the language of Article III of the service agreement here involved standing alone. Nevertheless, petitioner argues that the service agreement should not be construed to permit Pacific Northwest to file rate changes with respect to non-suspendible industrial resale rates under Section 4 of the Act because of the further provision in paragraph 10 of the General Terms and Conditions that the "[b]uyer shall have the right to protest any such new rate schedules and changes before the Federal Power Commission" (Pet. 10–11). It contends that this provision distinguishes this case from *Memphis* where such an express provision was not present (Pet. 19) and urges that this right to protest rate changes has no meaning with respect to non-suspendible rate changes so that "by necessary implication" Pacific North-

west's reservation to make rate changes cannot apply to such rates (Pet 10-11). Petitioner fails to acknowledge, however, that under the Commission's interpretation of the service agreement the buyer, by invoking its "right to protest," may persuade the Commission to order decreases in the non-suspendible rates for the future.[13]

Although the purchasing distributing companies in the *Memphis* case had not *expressly* reserved the right to protest before the Commission rate changes filed by the seller, that fact does not make *Memphis* any less controlling here. In the first place, the Commission in the *Memphis* proceedings found that the right of the purchasers in that case to complain of rate increases had not been waived by the service agreements permitting the seller to file rate changes, subject only to Commission review under Section 4 of the Act. See *United Gas Pipe Line Co.*, 16 FPC 19, at 23, 25.[14]

[13] Petitioner cannot successfully contend that even if its protest pursuades the Commission to find an increased rate unreasonable and to order a lower rate a seller could immediately file a new rate schedule, which would go into effect after the thirty-day notice period, at the level previously rejected or even a higher one. For, absent a showing of a substantial intervening increase in its costs, petitioner's new filing would be subject to summary disposition. See *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 236 F. 2d 606 (CA 3); *State Corporation Commission of Kansas* v. *F.P.C.*, 206 F. 2d 690, 715 (CA 8), certiorari denied, 346 U.S. 922.

[14] The Commission's regulations provide (18 C.F.R. 154.27):

"Comments of any purchaser or other interested party concerning any filing made pursuant to this part should be submitted within 15 days after the date of filing. This section shall not limit any right to file protests and complaints."

Second, the purpose of the right to protest accorded to petitioner in this case can only be to negate any possible contention by Pacific Northwest that petitioner had waived its right to protest the justness and reasonableness of changed rates. For it is, of course, clear that the parties to a private contract have no power to confer on each other rights before the Commission which are not afforded by statute or regulation.

Moreover, petitioner's construction of paragraph 10 of the General Terms and Conditions ignores the fact that the right to protest reserved therein is a reservation made in the context of Section 4 of the Act. For the right to protest is reserved only with respect to "any *such* new rate schedules and changes" [emphasis supplied]. This is necessarily a reference back to the preceeding two sentences of the General Terms and Conditions which necessarily contemplate unilateral Section 4 rate filings by Pacific Northwest, since no other type of rate change is referred to in the paragraph. And while a determination by the Commission that an increased industrial gas rate is unjust and unreasonable can provide petitioner prospective relief only because of the Commission's inability to suspend such increased rates, to require refunds or to award reparations, the right to protest reserved to petitioner by paragraph 10 permits it to seek at least such prospective relief and cannot be said to be meaningless, within the existing statutory scheme to which the "right to protest" was addressed. It should also be observed here that while, with respect to rates for industrial resale gas only, the Com-

mission's interpretation of paragraph 10 gives meaning to all parts of that provision, petitioner, to give greater significance to its right to protest rate changes, would deprive the equally explicit right of the seller to file changes in rates of all meaning.

In addition, if Pacific Northwest and petitioner, at the time they entered into their service agreement relating to sales for resale for industrial use only, had believed that the rate change provisions of paragraph 10 of the General Terms and Conditions were not intended to relate to such non-suspendible changes, such an intent could easily have been manifested by specifically excluding those provisions from the incorporation by reference in Article III of the service agreement.

Moreover, the fact that the contract construction now urged by petitioner does not reflect a contemporaneous view of the contract is also evidenced by petitioner's action in these proceedings. Thus, when petitioner originally protested the rate increases proposed in August, 1957, petitioner did not even suggest that the Commission should reject the filed increased rates but urged only that they were unjust and unreasonable and should be set down for hearing (R. 751). After the Commission had ordered a hearing on Pacific Northwest's increased rates, petitioner filed a Motion to Intervene, but again did not suggest that any of the rate schedules should be rejected for filing. Only after the decision of the Court of Appeals for the District of Columbia in the *Memphis* case [15] did

[15] *Memphis Light, Gas & Water Division* v. *F.P.C.*, 250 F. 2d 402.

petitioner urge the Commission to reject Pacific Northwest's rate changes for filing. When the Commission denied this motion, and the comparable motions of other interested persons after the Supreme Court's decision in *Memphis,* petitioner, in seeking reconsideration, for the first time urged that none of the rate schedules applicable to its rates should have been accepted for filing because of its right to protest. And while it did suggest that with respect to the increases in rates for industrial resale use only there were constitutional infirmities, petitioner did not even at that time suggest that the provisions of paragraph 10 were open to two constructions—one for service agreements relating to resales for industrial use only and a different one for all other sales. Not until its brief was filed in this Court, did petitioner suggest this split personality for paragraph 10.

Petitioner's course of conduct shows that its present construction of the contract is a mere after-thought. This is confirmed by the failure of any of the interested state commissions or other purchasers from Pacific Northwest to urge such a construction or even to file applications for rehearing of the Commission's order denying their motions to reject Pacific Northwest's rate increase filings which, like petitioner's motion, had been based principally on the Court of Appeals decision in *Memphis.* This failure also shows that, except for petitioner, the other purchasers under service agreements with Pacific Northwest, as well as the state commissions, accept the Commission's view

that the Supreme Court decision in the *Memphis* case is dispositive of the present case in all respects.

The foregoing conclusions are in no way affected by petitioner's contention that, if the service agreement is construed as permitting unilateral rate filings under Section 4 with respect to sales for resale for industrial use only, the price condition of the service agreement would be unenforceable since it would permit Pacific Northwest to establish prices entirely at its will (Pet 11).[16] For while the cases and other authorities do support the proposition that a price conditioned entirely on the will of one of the parties cannot be enforced, it is clear that an agreement to pay whatever price, generally applicable to all purchasers of the same class at the time of delivery, is filed, listed, or posted by the seller does not come within that category and is valid as a matter of general law. E.g., *Col-Tex Refining Co.* v. *Coffield & Guthrie, Inc.*, 196 F. 2d 788 (CA 5); *Buggs* v. *Ford Motor Co.*, 113 F. 2d 618 (CA 7), certiorari denied, 311 U.S. 688; *Ken-Rad Corp.* v. *R. C. Bohannan, Inc.*, 80 F. 2d 251 (CA 6); see also *Corbin*, Contracts § 98; *Williston*, Sales (Rev. Ed.) § 167. The rates charged by Pacific Northwest are necessarily those filed with the Commission under Section 4 in tariffs of general applicability and hence would not be considered prices estab-

[16] It may be of interest to the Court that the same contentions were presented to the Supreme Court without success in the *Memphis* case. See, e.g., brief for respondents, pp. 33–34; Brief of City of Hattiesburg, Mississippi, Amicus Curiae, p. 69–70; Brief of State of Wisconsin, Amicus Curiae, pp. 14–19.

lished entirely at the will of the seller even if they were not subject to review by the Commission.[17]

And even if the price provision in this case were deemed to be unenforceable as permitting the seller to fix the rates at will, petitioner's conclusion that such an invalidation would bring the case within the rule of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332, is not sound. For as the cases cited by petitioner show, the entire contract becomes unenforceable if such a price provision is considered invalid unless, as in the *Taller & Cooper* case, *supra,* one of several price conditions can be deemed controlling. But here no fixed price is mentioned in the service agreement, the only price provision referring to the applicable tariff schedule on file with the Commission. If the service agreement here involved were so voided, changes filed would have been

[17] The cases relied upon by petitioner (Pet 11) are not inconsistent with this view. In *Taller & Cooper* v. *Illuminating Electric Co.*, 172 F. 2d 625 (CA 7), a sales contract provided for the sale of electric irons at a specific price and also included provisions that prices should be as shown in the seller's current price sheet. In concluding that the seller was not justified in raising its price above the amount fixed in the contract, the court held that the specific price fixed in the contract governed. While the court notes that a provision permitting a seller to set the contract entirely at will would invalidate the contract, the principal basis for decision was that the contract price was absolutely fixed, a fact distinguishing list price cases such as those cited by us. *Washington Chocolate Co.* v. *Canterbury Candy Makers, Inc.*, 18 Wash. 2d 79, 138 P. 2d 195, while relating to a contract to sell candies at "current list price", is not contrary to the general rule sanctioning price provisions referring to filed, listed or posted prices, because there the seller did not in fact maintain a price list of general applicability but set different prices for each customer.

properly accepted by the Commission as *ex parte* filings sanctioned by Section 4(d) in the absence of any contractual relationship. See *United Gas Pipe Line Co.* v. *Memphis Light Gas and Water Division,* 358 U.S. 103 at 112.

II. The rate filing procedures of Section 4 of the Act are not unconstitutional as applied to changes in rates for sales for resale for industrial use only

Petitioner also contends that it will be denied due process under the Fifth Amendment if Section 4(d) of the Act is construed to permit the unilateral filing of rate increases by Pacific Northwest with respect to sales for resale for industrial use only. Recognizing that the unilateral rate filing scheme it challenges has been approved by the Supreme Court in *Memphis* over objections that Congress could not have intended unilaterally proposed rate increases to go into effect prior to Commission hearings and approval since new rates for sales for industrial resale only cannot be suspended, it seeks to escape the *Memphis* holding on the ground that the constitutional issues it presses were not raised there. It contends here that the procedure sanctioned by the Commission (1) may result in an unconstitutional taking and (2) denies it a hearing as to the reasonableness of the rates, again neglecting to state that its contention in this respect relates only to the period between the filing and the conclusion of the Commission proceeding, and overlooking the fact that the five month's suspension of other increases puts those sellers in a comparable position. Whether or not *Memphis* in fact disposed of these

constitutional questions, these contentions are, we submit, without merit.[18]

The contention that the Commission's construction of the Act, as approved by the Supreme Court in *Memphis,* may result in an unconstitutional taking is premised on the assumption that petitioner will have been deprived of the right to recover the unjust and unreasonable portion of its payments, which it would have been able to obtain absent the Act, if the seller's price were found to be not just and reasonable. But absent the Natural Gas Act, we know of no law that a wholesale seller of natural gas could charge only a "just and reasonable" price. Accordingly, the basic premise of petitioner's argument that the Act is arbitrary because it provides no substitute remedy (Pet. 12–17) fails since no prior remedy existed.

Moreover, petitioner's reliance on the declaration in Section 4(a), *infra,* p. 29, of the Natural Gas Act that

[18] The State of Washington filed an amicus curiae brief in *Memphis* in support of the lower court's decision, explaining that its interest resulted from the rate increase filed by Pacific Northwest in 1957 with respect to sales for industrial resale only. Relying on the provision of Section 4(e) of the Act prohibiting the suspension of such industrial resale rates, the State argued that Section 4(d) of the Act should not be interpreted as authorizing a seller to file rate increases thereunder unless the rate increase is specifically agreed to by its customers because, *inter alia,* such a construction avoids the constitutional issue now pressed by the petitioner. The brief for the respondents in *Memphis* also relied heavily on the inequity of permitting the unilateral filing of non-suspendible rate increases (Brief for respondents, pp. 63–71), relying largely on the facts with respect to this proceeding alleged in the petition of intervention of Coos Bay Pulp Corp., et al. (R. 1255).

unreasonable rates are unlawful is misplaced. For this declaration is but part of a regulatory scheme, which cannot be given independent meaning out of the context of the entire Act. As the Supreme Court said in *Montana Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, at 248, when speaking of the almost identical provisions of the Federal Power Act:

> [T]he prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.
>
> Petitioner * * * cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the field rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

And accepting *arguendo* petitioner's assumption that under the *Montana-Dakota* case, and *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, a purchaser under a nonsuspendible rate schedule would not be able to obtain reparations in a court proceeding even if the Commission finds the filed rates to be unreasonable (Pet. 16), it must also be assumed that a Commission finding that a rate for sales for industrial resale gas only is not reasonable can be given prospective meaning only so that there would be no warrant for finding such rates unlawful under Section 4(a) for the period between

the filing and the termination of a Section 4 rate proceeding.

While the Commission believes that it should be given the power to suspend industrial rates [19] and thereby the power to order these rates to go into effect subject to refund [20] so that any finding that a filed rate is unjust and unreasonable could relate back to the time when it went into effect subject to a refund, the provision against the suspension of rates for industrial resale use only involves a statutory effort to strike a balance between the interests of the seller and the purchasers. For while petitioner may suffer a loss on its industrial resales during the pendency of Commission hearings, that fact may be offset in substantial measure by the fact that Pacific Northwest's proposed increases on its other sales were suspended for the five months authorized by Section 4(e), and consequently even should the Commission determine that the increases requested by Pacific Northwest were

[19] The Commission has recommended in each of its annual reports to Congress since 1951, and for some years prior thereto in its justification for appropriations, that the prohibition against suspension of rates for industrial resales be removed from the Act. Annual Repts. of the Federal Power Commission, for 1956–1958, at pp. 144, 152, 154, 170, 181, 18, 24, and 16, respectively.

[20] The Commission has consistently taken the view that under Section 4(e) of the Act, its power to permit rates to go into effect subject to a condition that refund be made of those portions of the rates and charges that may later be found unjustified is dependent on its ability to suspend such rates. However, a petition for review is now pending which contends that the Commission has the power to impose refund conditions before permitting non-suspendible industrial resale rates to go into effect. See Petition for Review in *The Gas Service Co., et al.* v. *F.P.C.*, CADC No. 15401, filed October 9, 1959.

justified in full, petitioner has been relieved from paying the increased rates in other instances during the period of suspension. Cf. *Hope Natural Gas Co.* v. *F.P.C.*, 196 F. 2d 803 (CA4).

Even if it be assumed that the delays inherent in processing the heavy volume of proposed rate increases have resulted in imposing an undue burden on purchasers of natural gas for industrial resale only, the defect in the Act is one which "must be cured, if at all, by the Legislature." *Public Service Commission* v. *Iroquois Natural Gas Co.,* 184 App. Div. 285, 287, 171 N.Y. Supp. 379, 381, affirmed 226 N.Y. 580, 123 N.E. 885. See also *Hope Natural Gas Co.* v. *F.P.C.,* 196 F. 2d 802, 808 (CA4); *Public Service Commission* v. *Pavilion Natural Gas Co.,* 232 N.Y. 146, 151, 133 N.E. 427, 428; *Armour Packing Co.* v. *United States,* 209 U.S. 56, 82. For petitioner's basic objection to the statute is that its regulatory scope with respect to industrial resale rates is inadequate. And, indeed, with respect to such rates, the filing procedures only prevent discrimination between similarly situated wholesale purchasers until the Commission has an opportunity to pass on the reasonableness of the rates to be charged thereafter. But the determination of whether regulation of such sales should be more extensive must be made by Congress, not the courts. As stated in *Town of North Hempstead* v. *Public Service Corp.,* 231 N.Y. 447, at 450, 132 N.E. 144, at 145, even if the "method of increasing rates without first obtaining an adjudication as to their reasonableness may appear defective and illogical, * * * no constitutional limitation on legislative power interdicts it * * *."

It should also be noted that while Congress felt that with respect to sales for industrial resale only competition of natural gas with other fuels made the suspension of rate increases unnecessary, petitioner was not required by the Act to purchase its gas for industrial resales under a non-suspendible rate schedule. For while many pipeline sales include gas for industrial resale, the rates for such sales are non-suspendible only if set out completely on a schedule separate from other sales. See *State Corporation Commission of Kansas* v. *F.P.C.*, 206 F. 2d 690, 698–702 (CA8), certiorari denied, 346 U.S. 922. Indeed, of the eighty largest pipeline companies, only seven make separate (and thus non-suspendible) sales for industrial resale, and such sales averaged only 6.1% of the total dollar volume of the jurisdictional business during the calendar year 1956, and the fiscal years ending in 1956 and 1957.

Here petitioner could have entered into a service agreement for industrial resale gas under Rate Schedule DL–1, relating to Distributing System Service—Large Volume, (R. 9–11), instead of buying under Rate Schedule I–1, relating to interruptible industrial service only (R. 16). But while rate increases under the "DL–1" would have been suspendible, the separate interruptible industrial rate schedule provides a lower rate. In fact, the increased rates under the "I–1" schedule now being paid by petitioner are less than the suspendible "DL–1" rate even if none of the suspended rate increases were to be allowed by the Commission. It is thus apparent that in purchasing under the interruptible schedule petitioner deliberately chose

to risk non-suspendible rate increases, relying on Pacific Northwest's need for new industrial customers and the competition with other fuels to keep the prices at a reasonable level.

The willingness of petitioner to take the risk of increases in non-suspendible rates is also fully explained by the fact that it can pass the increases on to its customers. Thus the State of Washington in its brief (p. 7) in the *Memphis* case said:

> * * * While rate increases by the Pacific Northwest Pipeline Company are borne in the first instance by these distributors, their impact is and must necessarily be directly upon the consumers. It could only be otherwise if the distributors were earning in excess of a fair rate of return prior to such increases in their cost of rendering service to their customers.[21]

[21] Under the Washington rate filing statute, filed rate changes will go into effect on thirty days notice unless suspended. The maximum suspension period is ten months. See Rev. Code of Washington §§ 80.04.130 and 80.28.060.

CONCLUSION

For these reasons, it is respectfully submitted that the orders of the Commission be affirmed.

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OCTOBER 26, 1959.

APPENDIX

Statutes Involved

The pertinent provisions of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717 *et seq.*, provide as follows:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commisison, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all

rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule

and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States [22] for any

[22] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court,

within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in

whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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